

1 Since Appellant conceded Claim Nos. 71 and 73 as duplicative of Claim No. 85, the
2 Bankruptcy Court properly disallowed both claims in their entirety. The Bankruptcy Court also
3 denied the class portion of Claim No. 85 on substantive grounds, and limited Claim No. 85 solely to
4 Westfall in his individual capacity.²

5 Appellant urges this Court to reverse Judge Hargrove's decision denying the class portion of
6 Claim No. 85 asserting that the Bankruptcy Court abused its discretion. That order is a final order,
7 which confers jurisdiction upon this Court over this appeal pursuant to 28 U.S.C. § 158(a)(1). *See*
8 *also In Re Prestige Limited Partnership-Concord*, 234 F.3d 1108, 1112-14 (9th Cir. 2000) (an order
9 of the Bankruptcy Court disposing of an objection to a claim is a final order). Having read and
10 considered the briefs and the record of proceedings below, and for the reasons that follow, the Court
11 **AFFIRMS** the order of the Bankruptcy Court.

12 **I. BACKGROUND**

13 Prior to December 2003, the Debtors in Possession ran a business selling ephedra-based
14 dietary supplements. They stopped selling these products in December 2003 and continued to
15 market and sell only non-ephedra products. The non-ephedra business, however, was burdened by
16 the substantial expenses resulting from the enormous volume of litigation initiated by consumers of
17 their former ephedra-based dietary supplements.

18 Before the bankruptcy cases were filed, a majority of the ephedra-based lawsuits in federal
19 court had been consolidated in a multi-district litigation ("MDL") court proceeding pending before
20 the Honorable Jed Rakoff in the Southern District of New York. Since the bankruptcy cases were
21 filed, almost all of the ephedra cases that were not already in the MDL were subsequently
22 transferred to the MDL court for pretrial administration by the Judicial Panel on Multidistrict
23 Litigation.

24 On March 16, 2004, Westfall and three other representative plaintiffs, Debra Kline, Dennis
25 Kline, and Idella Westfall (collectively, "Westfall Plaintiffs") commenced a federal class action
26 lawsuit against MII and other defendants ("Westfall Action"). The Westfall Action asserted

27 ² For purposes of this appeal, the Court focuses solely on the review of Claim No. 85 since Appellant
28 has already conceded Claim Nos. 71 and 73 as duplicative of Claim No. 85.

1 personal injury claims relating to the consumption of ephedra-containing products. The Westfall
2 Action was transferred from the Eastern District of Pennsylvania to the MDL proceeding on June
3 16, 2004.

4 MII negotiated a class action settlement with the Westfall Plaintiffs who moved for approval
5 of the class action settlement and class certification in the MDL proceeding. After learning that the
6 Debtors in Possession intended to file bankruptcy, Westfall sought permission to withdraw the class
7 certification motion. However, this request was denied by Judge Rakoff. Judge Rakoff also
8 ultimately denied class certification and preliminary approval of the class action settlement. An
9 order, incorporating the statements of Judge Rakoff in open court, was entered on June 2, 2005. The
10 order stated that an opinion setting forth the court's reasoning "will issue in due course." Judge
11 Rakoff issued that opinion on September 11, 2005.

12 The Debtors in Possession formally filed their bankruptcy petitions on June 30, 2005, under
13 Chapter 11 of the Bankruptcy Code.³ The United States Trustee appointed the Official Committee
14 of Unsecured Creditors ("OCC") on July 5, 2005. At the request of certain retailers who sold MII
15 products, the Bankruptcy Court also directed the United States Trustee to appoint an Official
16 Committee of Indemnity/Retailer Creditors ("OIC") in the MII case. On July 22, 2005, Westfall's
17 counsel filed a Notice of Appearance and Request for Service of Papers for the bankruptcy case.

18 In September 2005, Westfall, without any of the other Westfall Plaintiffs, filed three Proofs
19 of Claim on behalf of himself and the purported class.⁴ Claim Nos. 71 and 73 listed the amount of
20 the claim as "unliquidated." Claim No. 85 listed the amount of the claim as \$125 million.

21 On November 3, 2005, the Bankruptcy Court approved a sale of certain non-ephedra related
22 assets of the Debtors in Possession for a purchase price of approximately \$12 million. The sale
23 created a limited fund with which to satisfy all administrative expenses, trade claims, and uninsured
24 and underinsured ephedra related claims. On November 10, 2005, the Appellee's filed an *Ex Parte*
25 Application for Order: A) Setting a Claims Bar Date; B) Establishing Certain Additional

26 ³ The Bankruptcy Court ordered that the bankruptcy cases be jointly administered on July 1, 2005.

27 ⁴ Westfall Plaintiffs Debra Kline and Dennis Kline filed their own separate Proofs of Claim. Westfall
28 Plaintiff Idella Westfall did not file a Proof of Claim.

1 Requirements for Ephedra Claims; C) Approving Form of Notice; and D) Granting Additional
2 Relief (“Bar Date Application”). The Bar Date Application was drafted with the input of the OCC,
3 certain retailers and a manufacturer of MII products, insurers for the Debtors in Possession,
4 representatives of certain ephedra plaintiffs groups, and the MII shareholders. The OCC filed a
5 joinder to the Bar Date Application on November 15, 2005.

6 On November 16, 2005, the Bankruptcy Court entered an order granting the Bar Date
7 Application and approving the form of notice which was attached to the order (collectively, “Bar
8 Date Order”).⁵ In addition, the Bar Date Notice set out the specific additional filing and reporting
9 requirements for claimants asserting a claim against either of the Debtors in Possession based on
10 personal-injury or wrongful-death claims, and any other claims that relate to the purchase or
11 consumption of ephedra-based products as provided in the Bar Date Order. Failure to adhere to
12 these specified requirements could result in the barring of potential claims.

13 On December 2, 2005, the Debtors in Possession served the Bar Date Notice on
14 approximately 1,000 parties appearing on the Bankruptcy Court matrix, including counsel for
15 Westfall.⁶ In addition, the Bar Date Notice was published in the national newspaper *USA Today* on
16 two separate occasions. Finally, the Bar Date Notice was posted on the MII website.

17 By letter dated January 26, 2006, the Debtors in Possession notified Westfall that his claims
18 were defective in that the Proof of Claim Supplements required under the Bar Date Order (and
19 pursuant to the Bar Date Notice) had not been received for the purported class members. Thereafter
20 in February 2006, Westfall provided the Proof of Claim Supplement solely relating to Plaintiff
21 Westfall, and no other purported class members.

22 On July 27, 2006, the Debtors in Possession objected to Claim Nos. 71 and 73 as duplicative
23 of Claim No. 85. The Debtors in Possession also objected to Claim No. 85, to the extent it asserted
24 rights of the purported class, as duplicative of all other ephedra-related claims filed against one or

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26 ⁵ The notice, entitled Notice of A) Bar Date (Deadline) for Filing Proofs of Claim or Interests, and B)
27 Additional Requirements for Filing Proofs of Ephedra Claims (“Bar Date Notice”), implemented the provisions
28 of the Bar Date Order and specifically advised creditors that all Proofs of Claim were to be filed with the Clerk
of the U.S. Bankruptcy Court on or before January 17, 2006, (“Bar Date”).

⁶ The Bar Date Notice referenced that a Bar Date Order had been issued.

1 both of the Debtors in Possession. On August 16, 2006, Westfall filed a response to the objections
 2 conceding that Claim Nos. 71 and 73 were duplicative of Claim No. 85. The response also argued
 3 that the class portion of Claim No. 85 should be allowed, but did not object to the Bar Date Order or
 4 the Bar Date Notice. The Debtors in Possession filed a reply on August 23, 2006. The OCC filed a
 5 joinder and supplement to joinder to the reply of the Debtors in Possession.

6 On October 4, 2006, the Bankruptcy Court held a hearing to consider, *inter alia*, the
 7 objections to Claim Nos. 71, 73, and 85. At the outset of the hearing, the Bankruptcy Court
 8 announced its tentative ruling to deny the class portion of Claim No. 85. The Bankruptcy Court
 9 gave its preliminary reasoning: 1) Westfall had failed to submit claim supplements for the purported
 10 class members and failed to commence an adversary proceeding as required by the Bar Date Order;
 11 and 2) in the MDL proceeding, Judge Rakoff had denied certification of Westfall's purported class,
 12 and therefore collateral estoppel barred Westfall from relitigating the issue.⁷ In response to the
 13 Bankruptcy Court's tentative ruling, Westfall's counsel for the first time asserted that the Bar Date
 14 Notice was insufficient and violated the purported class members' due process rights. The
 15 Bankruptcy Court noted that Westfall's actions had "an aura of forum shopping."⁸ (This same
 16 observation was made previously by Judge Rakoff.)

17 The Bankruptcy Court ultimately denied the class portion of Claim No. 85 as noncompliant
 18 with the Bar Date Notice and duplicative of other filed ephedra claims. The Bankruptcy Court
 19 issued its order on October 10, 2006. The order denied Claim Nos. 71 and 73 as duplicative of
 20 Claim No. 85, disallowed Claim No. 85 as a class Proof of Claim, and limited Claim No. 85 to
 21 Westfall only. Appellant timely appealed.

22 II. STANDARD OF REVIEW

23 A district court reviews the findings of the Bankruptcy Court with the same standard as the
 24 Court of Appeals would review a finding of a district court in general civil matters. 28 U.S.C.
 25 § 158(c)(2). As such, this Court reviews the Bankruptcy Court's findings of fact under a clearly

26 ⁷ The Bankruptcy Court later withdrew the finding of collateral estoppel.

27 ⁸ Judge Hargrove inquired as to why Westfall's counsel had not sought relief from the automatic stay
 28 to appeal Judge Rakoff's order denying class certification.

erroneous standard and its conclusions of law *de novo*. *In re Jastrem*, 253 F.3d 438, 440 (9th Cir. 2001). The Court reviews the Bankruptcy Court's exercise of equitable powers for abuse of discretion, and will not reverse its decision unless it is "based on an error in law or if the record contains no evidence to rationally support the decision." *In re Conejo Enterprises, Inc.*, 96 F.3d 346, 351 (9th Cir. 1996). Simply put, the Court will not reverse the Bankruptcy Court unless it has a "definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached." *In re Atkins*, 69 F.3d 970, 973 (9th Cir. 1995) (internal citation and quotation omitted).

III. DISCUSSION

The Ninth Circuit has determined that the Bankruptcy Code does allow for class proofs of claim. *See In re Birting Fisheries, Inc.*, 92 F.3d 939, 939 (9th Cir. 1996). However, Bankruptcy Courts have broad discretion to allow or disallow such class claims. This Court finds that there is ample evidence to support the Bankruptcy Court's denial of the class portion of Claim No. 85. Since Judge Rakoff, prior to the commencement of the bankruptcy proceedings,⁹ denied the class certification and denied the preliminary approval of the class action settlement on June 2, 2005, there was no viable class claim presented to the Bankruptcy Court. Judge Hargrove appropriately considered Judge Rakoff's ruling and rightly determined that the Appellant should have appealed Judge Rakoff's order.

The Bankruptcy Court further found that Appellant failed to follow the Bankruptcy Court's order regarding the procedure for filing claims. The order essentially required that *each* creditor holding an ephedra claim serve a copy of the proof of claim and completed supplement. This was not done for any of the purported class claimants. As it stood, there was not a viable class claim presented to the Bankruptcy Court; therefore, the Bankruptcy Court correctly examined Claim No.

⁹ The Court is not persuaded by Appellant's argument that Judge Rakoff's ruling was not effectuated until September 11, 2005, after the bankruptcy proceedings were initiated. While it is true that the detailed written order was issued after the bankruptcy proceedings began, the actual ruling occurred beforehand on June 2, 2005, when Judge Rakoff denied class certification and preliminary approval of the class action settlement. Furthermore, Judge Rakoff issued a brief, but perfunctory, written order denying certification pre-petition. The order stated that "[a]n opinion setting forth the reasons for this ruling will issue in due course," which was later issued on September 11, 2005. Nonetheless, the actual ruling denying certification occurred on June 2, 2005.

1 85 as an individual claim. Similarly, the Bankruptcy Court correctly examined the accompanying
2 Fact Sheet Supplement as representative of Mr. Westfall solely in his individual capacity alone.
3 Since there was not a viable class, Westfall could not be considered to be a representative of the
4 class; therefore, the scope of the Fact Sheet Supplement could not and should not have been
5 expanded beyond Westfall himself.

6 Lastly, Westfall's challenge to the Bar Date Order and Bar Date Notice at oral argument was
7 clearly untimely. Westfall did not object or seek reconsideration of the Bar Date Notice Until
8 almost a year after it was published despite knowledge of its existence. The Bankruptcy Court
9 properly determined that such delay was inappropriate. The Bar Date Notice was carefully crafted
10 by MII, the OCC and other parties to apprise all possible claimants of the requirement to file a proof
11 of claim. The notice was mailed to more than 1,000 parties on the Bankruptcy Court's creditor
12 matrix and published twice in the national newspaper USA Today and circulated for a total of four
13 days. Any objections by the Appellant concerning the Bar Date Order and Bar Date Notice should
14 have been filed closer in time to the issuance of the Bar Date Order rather than approximately one
15 year after its publication.

16 In conclusion, the Bankruptcy Court has broad discretion to allow or disallow class claims
17 before or after they are filed, and regardless of bar date notification. In this case, the Bankruptcy
18 Court did not abuse its discretion in disallowing the class portion of Claim No. 85.

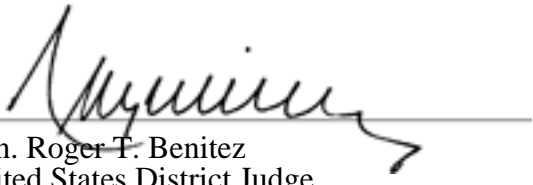
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1 **IV. CONCLUSION**

2 The record on appeal shows that the Bankruptcy Court acted well within its discretion in
3 disallowing the class portion of Appellant's claim. Accordingly, this Court **AFFIRMS** the order of
4 the Bankruptcy Court denying the class portion of Claim No. 85 as well as **AFFIRMS** the denial of
5 Claim Nos. 71 and 73 as duplicative. All other pending motions are **DENIED** as moot. The Clerk
6 of the Court shall enter Judgment in favor of Appellees and against Appellant.

7 **IT IS SO ORDERED.**

8 DATED: September 11, 2007

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10 Hon. Roger T. Benitez
11 United States District Judge
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